

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
CRISPIN GARCIA-ESPANA,  
Defendant.

NOS. CR-04-223-RHW  
CR-04-253-RHW

**ORDER GRANTING  
DEFENDANT'S MOTION  
TO DISMISS**

Before the Court is Defendant's Motion to Dismiss (CR-04-223-RHW [Ct. Rec. 60]). A hearing was held on the motion on February 22, 2007, in Spokane, Washington. Defendant was present and represented by Kim Deater. The Government was represented by Earl Hicks. The Government requested the hearing be continued to a later date. On February 26, 2007, a hearing was held on the motion. Defendant was present and represented by Kim Deater. The Government was represented by Pam Byerly.

Defendant asserts that the underlying deportation proceeding violated his due process rights and therefore cannot serve as a predicate element of his § 1326 conviction. Specifically, Defendant asserts that INS erred in concluding that he was deportable because of his vehicular homicide conviction, which in turn, invalidated his deportation order. The Court agrees.

**BACKGROUND**

In December 1998, Defendant was convicted of vehicular homicide in Skamania County (WA) Superior Court and was sentenced to 27 months. While in

1 state custody, INS served him with a Notice of Intent to Issue a Final  
2 Administrative Removal Order (NOI) on December 15, 1999. The Notice  
3 informed him that he was deportable because he was convicted of an aggravated  
4 felony and that he would be deported without a hearing before an Immigration  
5 Judge (IJ).<sup>1</sup> The notice also explained his rights and responsibilities. Defendant  
6 was told that he may choose to be represented by counsel, and a list of free legal  
7 services would be provided, and that he must respond to the notice within 10 days.  
8 He was told he could seek judicial review of any final administrative order by  
9 filing a petition for review within 14 days after the date of the order. Defendant  
10 indicated that he did not wish to contest the allegations set forth in the Notice of  
11 Intent and he waived his right to file a petition for review of the Final Removal  
12 Order. A Final Administrative Removal Order was issued on January 21, 2000.  
13 Defendant was then deported.

14 Defendant was again found in the United States in the District of Arizona  
15 and was convicted of 8 U.S.C. § 1326 in September 2000. He was sentenced to a  
16 term of imprisonment of 30 months. He was deported on June 18, 2002, based  
17 upon an order reinstating the initial order of removal. In 2004, Defendant was  
18 again found in the United States in the Eastern District of Washington and was  
19 indicted for illegal reentry in violation of 8 U.S.C. § 1326, and was sentenced to 30  
20 months, with an additional 12 month consecutive sentence for supervised release  
21 violations.<sup>2</sup> Defendant appealed his 2004 sentence, and the Ninth Circuit Court of

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23 <sup>1</sup>8 U.S.C. § 1228 provides for the Expedited Removal of Aliens convicted of  
24 Committing Aggravated Felonies. Under this section, an alien convicted of an  
25 aggravated felony is not entitled to a deportation hearing. Additionally, such alien  
26 is conclusively presumed to be deportable from the United States, and is not  
27 eligible for any relief from removal that the AG may grant in the AG's discretion.

28 <sup>2</sup>The indictment specifically alleged the June 18, 2002, removal as a basis  
for the criminal charge.

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1 Appeals remanded the case with instructions to enter such orders as this Court  
2 deems appropriate.

### 3 DISCUSSION

4 “Because the underlying removal order serves as a predicate element of a §  
5 1326, a defendant charged with that offense may collaterally attack the removal  
6 order under the due process clause.” *United States v. Pallares-Galan*, 359 F.3d  
7 1088, 1094 (9<sup>th</sup> Cir. 2004) (*quoting United States v. Mendoza-Lopez*, 481 U.S. 828,  
8 837-38 (1987)). In order to sustain the attack under the controlling statutory  
9 provisions, a defendant must ordinarily show: (1) exhaustion of available  
10 administrative remedies to seek relief from the deportation order, (2) improper  
11 deprivation of the opportunity for judicial review, and (3) fundamental unfairness  
12 of the underlying removal order. *See* 8 U.S.C. § 1326(d). An underlying removal  
13 order is “fundamentally unfair” if (1) an alien’s “due process rights were violated  
14 by defects in the underlying deportation proceedings,” and (2) “he suffered  
15 prejudice as a result of the defects.” *Pallares-Galan*, 359 F.3d at 1094 (citation  
16 omitted).

17 An alien is barred under § 1326(d) from collaterally attacking his underlying  
18 removal order “if he validly waived the right to appeal that order during the  
19 deportation proceeding.” *Id.* (citation omitted). Where a waiver of the right to  
20 appeal a removal order is not “considered and intelligent,” however, an alien has  
21 been deprived of his right to that appeal and thus to a meaningful opportunity for  
22 judicial review. *Id.* In *United States v. Muro-Inclan*, the Circuit held that the  
23 exhaustion requirement cannot bar collateral review of a deportation proceeding  
24 when the waiver of right to an administrative appeal did not comport with due  
25 process. 249 F.3d 1180, 1184 (9<sup>th</sup> Cir. 2001). Thus, the failure to properly advise  
26 the alien of apparent eligibility for relief is a denial of due process that renders the  
27 waiver of appeal invalid, which in turn excuses the need to exhaust administrative  
28 remedies. *Id.* at 1183-84.

1 In *United States v. Camacho-Lopez*, the defendant appealed his conviction  
2 for illegal reentry following deportation, arguing that a defect in his earlier  
3 deportation proceeding invalidated his deportation order and appeal waiver. 450  
4 F.3d 928, 929 (9<sup>th</sup> Cir. 2006). The asserted defect was that the Immigration Judge  
5 erroneously advised the defendant that he was ineligible for discretionary relief  
6 because of his vehicular manslaughter conviction. *Id.* In that case, the  
7 Government conceded that the Supreme Court case of *Leocal v. Ashcroft*, 543 U.S.  
8 1 (2004), applied to the defendant's 1998 deportation hearing.<sup>3</sup> The Government  
9 also conceded that the defendant was excused from the exhaustion requirement  
10 because the IJ erroneously advised the defendant he was ineligible for  
11 discretionary relief, and therefore the defendant was deprived of a meaningful  
12 opportunity for judicial review. *Id.*

13 The Ninth Circuit held that because the defendant's Notice to Appear  
14 charged him as removable only for having committed an aggravated felony, which  
15 the vehicular manslaughter conviction did not meet, the defendant was removed  
16 when he should not have been and clearly suffered prejudice. *Id.*

17 The Court finds *Camacho-Lopez* directly on point.<sup>4</sup> Here, the defects in the  
18 underlying deportation proceeding invalidated the deportation order, and  
19 Defendant could not have knowingly and voluntarily waived his right to appeal.

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21 <sup>3</sup>In *Leocal v. Ashcroft*, the Supreme Court held that a felony conviction for  
22 driving under the influence while causing seriously bodily injury in an accident is  
23 not a "crime of violence" and therefore not an "aggravated felony." 543 U.S. 1  
24 (2004). In *Fernandez-Ruiz v. Gonzales*, 446 F.3d 1121 (9<sup>th</sup> Cir. 2006), the Ninth  
25 Circuit held that offenses that involve the reckless use of force are not crimes of  
26 violence as defined by 18 U.S.C. § 16.

27 <sup>4</sup>At the February 26, 2007 hearing, the Government conceded that *Camacho-*  
28 *Lopez* was directly on point, and agreed that the proper course of action would be  
to dismiss the indictment.

1 Defendant was erroneously advised that he was deportable under section  
2 237(a)(2)(A)(iii) because he was convicted of an aggravated felony. This  
3 erroneous advice excused Defendant from the exhaustion requirement, and  
4 deprived Defendant of a meaningful opportunity for judicial review. Because the  
5 NOI charged him as removable only for having committed an aggravated felony,  
6 Defendant suffered prejudice because he should not have been removed under 8  
7 U.S.C. § 1228(b). Under *Camacho-Lopez*, the proper course of action is to dismiss  
8 the indictment.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion to Dismiss (CR-04-223-RHW [Ct. Rec. 60]) is  
11 **GRANTED.**

12 2. The indictment in CR-04-223-RHW is **dismissed with prejudice.**

13 3. The Court finds that Defendant has not committed the alleged  
14 supervised release violation.

15 4. The Judgments entered on April 25, 2005 (CR-04-223-RHW [Ct. Rec.  
16 27] (CR-04-253-RHW [Ct. Rec. 18]) are **vacated.**

17 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
18 Order, provide copies to counsel and the U.S. Marshals Service, and close the files.

19 **DATED** the 6<sup>th</sup> day of March, 2007.

20 *s/ Robert H. Whaley*

21 ROBERT H. WHALEY  
22 Chief United States District Judge

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